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IN THE

Supreme Court of the United States

October Term, 1969

No. 992

NEW YORK FEED CO., INC., and STEPHEN HELLER,
Appellants,

against

HOWARD R. LEARY and FRANK S. HOGAN,
Appellees.

No. 998

MILKY WAY PRODUCTIONS, INC.,
JAMES BUCKLEY and AL GOLDSTEIN,
Appellants,

against

HOWARD R. LEARY and FRANK S. HOGAN,
Appellees.

MOTION TO DISMISS OR AFFIRM

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No. 998

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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, the appellee Hogan herewith moves to dismiss the appeals in the above entitled actions on the ground that they are not taken in conformity with 28 U.S.C.

Section 1253 and on the ground they do not present a substantial federal question; or, in the alternative, to affirm the judgment below as fully in accord with all controlling constitutional principles.

Preliminary Statement and Jurisdiction

The respective appellants appeal directly to this Court, pursuant to 28 U.S.C. Section 1253, from a decision of a three judge district court, rendered on October 15, 1969, denying motions for temporary injunctive and other preliminary relief.

Questions Presented

1. Whether, in the exercise of sound discretion, a federal district court should assume jurisdiction in a case seeking to enjoin prosecution for violation of a valid State statute?

2. Whether a substantial constitutional question under the First Amendment is presented by the definition of obscenity contained in Section 235.00 of the Penal Law, which, though incorporating relevant federal standards, does not require that a publication be pandered, foisted upon an unwilling public or sold to a minor?

3. Whether the rationality of the presumption of scienter contained in Section 235.10 of the Penal Law can be challenged though no facts on this issue were adduced in the lower court and though no showing has been made that the presumption will be applied in the upcoming prosecution?

4. Whether the *ex parte* arrest warrant procedure employed by the appellees in the present case necessarily raises an issue of constitutionality of Sections 148, 149 and 150 of the New York Code of Criminal Procedure which deal with the quantum of evidence necessary to issue a warrant for arrest?

5. Whether the First Amendment requires that an adversary proceeding be conducted prior to arresting a person for selling an obscene publication, no seizure of the publication occurring?

6. Whether appellants have standing to challenge the arrests of dealers for selling appellants' tabloids?

Statement of the Case

The Criminal Charges

The instant appeals involve two separate actions brought by separate and distinct parties against the identical defendants, appellees herein. In No. 998, appellants Milky Way Productions, Inc. (hereinafter referred to as "Milky Way"), Al Goldstein and James Buckley are the publishers and editors of the weekly tabloid entitled *Screw, The Sex Review* (hereinafter referred to as *Screw*).

In No. 992, appellants New York Feed Company, Inc. (hereinafter referred to as "New York Feed") and Stephen Heller are the respective publishers of *The New York Review of Sex and Politics* (hereinafter referred to as *Review of Sex*). As a result of the publication, distribution and sale of various issues of both weeklies, the appellants, as

well as newsdealers and distributors commercially handling the tabloids, have been arrested for the crime of obscenity [New York Penal Law, §235.05]. Appellants allege no seizures of publications. The persons arrested were arraigned in the New York City Criminal Court on charges of promoting, or possessing with intent to promote, obscene materials as these terms are defined in Section 235.00 of the New York Penal Law. Prosecutions on these charges are currently pending in the New York City Criminal Court.

Appellee Frank S. Hogan is the District Attorney of New York County and is charged under state law with the prosecution of all crimes committed in New York County. Appellee Howard R. Leary is the Police Commissioner of the City of New York.

The Complaints Filed by Appellants

The complaint filed by Milky Way in the United States District Court for the Southern District of New York on August 18, 1969 alleged that appellants Goldstein and Buckley along with newsdealers and distributors were arrested on May 20, 1969, for publishing and selling issues 14 and 15 of the tabloid, *Screw*. Similar arrests, the complaint also alleged, were made on June 26, 1969, following the publication of issue 17, and August 15, 1969, following the publication of issues 22 through 24. Milky Way further alleged that because of these arrests, the sales of issues 18 and 19 of *Screw* decreased from 75,000 to 17,000 copies. Milky Way also alleged that the appellee Hogan, although asked to do so, refused to pursue alternative methods of dealing with the tabloids herein, such as informal consultations with appellants' counsel, delineating those areas of

expression not entitled to protection under the First Amendment.

The complaint of New York Feed, filed on September 3, 1969, alleged that appellant Heller, Sam Edwards, one of New York Feed's employees, Al Druss, the principal employee of New York Feed's distributing company, and various newsstand dealers were all arrested on June 26, 1969 for publishing and selling issue 9 of *Review of Sex*. All except Druss were arrested again on August 15, 1969, following the publication of issue 12. New York Feed further alleged that following the arrests of June 26, the circulation of *Review of Sex* decreased from 40,000 to 30,000 copies; and, allegedly, on August 25, 8,000 copies of issue 13 of *Review of Sex* were refused by newsstands.

Throughout the proceedings below, appellants have conceded, and, indeed, it is undisputed, that the arrest of each appellant was preceded by an independent judicial examination of the tabloids, which resulted in a finding of probable cause to believe that specific issues of *Sextet* and *Review of Sex* were obscene (affidavit of Patrolman Donald Gray, filed September 11, 1969).[1] Appellants alleged in their complaints, however, that the procedure authorizing the issuance of an arrest warrant upon an *ex parte* judicial determination of the subject matter claimed to be obscene violated their rights under the First and Fourteenth Amendments of the Constitution. It was argued that an arrest for the crime of obscenity could not be made in the

1. In each instance, as Mr. Gray's affidavit indicates, the criminal complaints charging appellants with obscenity were submitted to a judge in support of an arrest warrant [§148 CCP]. The complaints are annexed to Gray's affidavit. The resulting judicial determination supplied the basis for the arrest of new dealers.

absence of an adversary proceeding at which the appellants, or newsdealers, or distributors—or any prospective defendant in an obscenity prosecution—were entitled to litigate the issue of probable cause.

Appellants alleged further that the definition of obscenity contained in Section 235.00 of the New York Penal Law is unconstitutional on its face under the First Amendment. New York Feed also challenged as unconstitutional Section 235.10 of the Penal Law, providing that:

> "A person who promotes obscene material, or possesses the same with intent to promote it, in the course of his business is presumed to do so with knowledge of its content and character."

Appellants sought permanent injunctive relief against the appellee Hogan as follows:

1. Milky Way sought an injunction prohibiting:

> "—any further arrests of newsdealers or [appellants] herein so long as the [appellants] publish copies of subject publication in the same character and format as that contained in Issues 17, 18 and 20, pending final resolution of the legal issues via the state courts, but with the right of [appellees] to proceed provided there is a radical departure from the standards and character of previous publications, enjoining [appellees] from making any arrests unless [appellees] negotiate in good faith with the [appellants] in accordance with the mandate of the Supreme Court of the United States prior to instituting any arrests to determine whether specific issues are obscene" (complaint of Milky Way, page 12).

Milky Way also sought a declaratory judgment that Sections 148 through 150 of the New York Code of Criminal

Procedure, statutes authorizing the issuance of arrest warrants by a judicial officer in a criminal case, were unconstitutional under the First Amendment in that they failed specifically to require an adversary hearing in advance of a person's arrest for selling an obscene publication.

2. New York Feed sought an injunction restraining future enforcement of the obscenity laws and further arrests of newsdealers, unless, prior to the issuance of an arrest warrant, a criminal defendant had the opportunity in an adversary proceeding to litigate the issue of obscenity concerning any publication which was the subject of a proposed criminal charge.

3. Appellants sought a declaratory judgment invalidating Section 235.00 (the definition of obscenity) of the New York Penal Law on its face; declaratory relief was also sought by New York Feed that Section 235.10 (the presumption of scienter) of the Penal Law was facially unconstitutional.

4. Appellants also demanded compensatory damages for economic losses incurred.

By motions, returnable in the District Court on September 16, 1969, appellants moved, pursuant to 28 U.S.C. §§2201, 2281 and 2284, for the convening of a three judge district court and for other temporary relief essentially similar to their prayers for final relief. The motion for a three judge district court was granted the next day (FRANKEL, D.J.), and the case was then argued before

Wilford Feinberg, Judge of the United States Court of Appeals for the Second Circuit and Marvin E. Frankel and Thomas F. Murphy, District Judges of the United States District Court for the Southern District of New York. The cases were decided jointly after the granting of a motion, upon the consent of the parties, to consolidate them for trial, pursuant to Rule 42 of the Federal Rules of Civil Procedure.

The Decision of the Court Below

In an opinion filed on October 15, 1969, the three judge district court denied completely all of the appellants' motions for temporary relief. Relying upon various decisions of this Court, the lower court rejected as untenable appellants' constitutional attack upon Section 235.00 of the Penal Law. Because of the inadequate record before it, the court did not reach the merits of New York Feed's contention that the presumption of scienter contained in Section 235.10 was irrational and hence unconstitutional [*cf. Leary v. United States,* 395 U.S. 6 (1969)]. Finally, the court also rejected on the merits appellants' claim that an arrest for the crime of obscenity must be preceded by an adversary hearing on that particular issue.

ARGUMENT

Since the attacks upon the New York statutes did not warrant the convening of a three judge court, this Court lacks jurisdiction to hear these appeals.

This Court lacks jurisdiction if the three judge court was improperly convened.

The appeal to this Court is taken pursuant to 28 U.S.C. Section 1253. But unless three judges were properly summoned to consider any of the appellants' claims, this Court lacks jurisdiction to hear these appeals [*Zemel* v. *Rusk*, 381 U.S. 1 (1965)]. Otherwise, a single district judge, by erroneously ruling that a particular claim warranted attention by three judges, could, in any case, vest this Court with appellate jurisdiction under Section 1253.

This is not a proper case for federal jurisdiction.

A threshold question at the outset of this appeal is whether the lower court properly decided to entertain this lawsuit on the merits. The complaints filed by both of the appellants sought equitable relief enjoining any future arrests that were not preceded by an adversary proceeding on the issue of obscenity, and declaratory judgments that certain penal statutes are unconstitutional under the First Amendment. Appellants did not ask the lower court to enjoin prosecution of the cases now pending in the Criminal Court, apparently recognizing that in the Southern District of New York, 28 U.S.C. Section 2283 constitutes a complete bar to federal intervention in pending state proceedings. See *Rage Books, Inc.* v. *Leary*, 301 F. Supp. 546 (S.D.N.Y. 1969).

The lower court ruled that the allegations in the complaints were insufficient to establish federal jurisdiction, there being no particularized showing that the prosecutions and the arrests were or would be undertaken in bad faith [*Dombrowski* v. *Pfister*, 380 U.S. 479 (1965)]. Additionally, the court found that the appellants had deliberately bypassed the available remedies offered by the state courts, preferring instead to litigate criminal defenses in advance in the federal court (Appendix of New York Feed, pp. 29-30). Finding that the request for declaratory relief was appropriate, the court proceeded to a disposition of the case on the merits, omitting only to decide a question presented by the constitutional attack upon Section 235.10 (presumption of scienter) of the New York Penal Law.

Recognizing that federal interference with criminal cases in the state courts raises recurrent problems concerning the efficient administration of criminal justice, this Court, on December 10, 1969, noted probable jurisdiction in *Batchelor* v. *Stein*, No. 565, to consider whether a defendant who is being prosecuted under an allegedly unconstitutional state obscenity statute is entitled to injunctive relief under *Dombrowski*. But *Batchelor* as well as *Samuels* v. *Mackell*, No. 20, *Fernandez* v. *Mackell*, No. 11, and *Younger* v. *Harris*, No. 4, three cases set down for reargument during this term of the Court, raise a further problem, namely, whether 28 U.S.C. Section 2283 precludes a federal injunction against pending state proceedings, a question not previously decided by this Court. These particular problems are not raised by the pleadings below, since besides seeking declaratory relief from the prospective enforcement of state statutes, appellants sought to enjoin only future pros-

ecution and arrests [*Zwicker* v. *Koota*, 389 U.S. 241, 254 (1968)].

The issue thus delineated, it is clear that the lower court should have declined, in the exercise of sound discretion, to assert its jurisdiction. For, it is well settled that a federal court should decline to assert federal jurisdiction while there are pending criminal proceedings between the same parties where the claims sought to be litigated in the federal forum can be effectively determined by the state courts [*Douglas* v. *City of Jeannette*, 319 U.S. 153 (1942)]. No person is immune from criminal prosecution undertaken in good faith for the commission of alleged criminal acts. This is true even where there is not the slightest doubt that the constitutional contention asserted in the federal proceeding is correct. Thus, in *Douglas, supra*, this Court ruled that it was improper for a federal district court to entertain a suit seeking to restrain threatened enforcement of a state statute that the court had previously declared unconstitutional in *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943). In the case at bar appellants' federal claims are not, to say the least, clearly correct. In enunciating the firm policy of noninterference by the federal judiciary with criminal litigation carried on in the state courts, this Court, in *Stefanelli* v. *Minard*, 342 U.S. 117, 124 (1951), pointed out the consequences of a contrary rule:

> "If we were to sanction [federal] intervention, we would expose every State Criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State Courts by resort to the federal forum, with review if need be to this Court, to determine the

> issue. Asserted unconstitutionality in the impanelling and selection of the grand and petit juries, in the failure to appoint counsel, in the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution."

The claims propounded by the appellants herein are indistinguishable from those mentioned in *Stefanelli* and the First Amendment contention considered in *Douglas* for purposes of determining whether the lower court, in the first instance, could have exercised its jurisdiction. Granting of a declaratory judgment would have disrupted the pending state proceedings. The reasoning of *Stefanelli* mandated dismissal of the complaints without further consideration on the merits.

Undeniably, there are rare situations which may call for the assertion of federal jurisdiction while there are pending criminal proceedings between the same parties. But to justify such interference, there must be such an exceptional demonstration of irreparable injury that equitable relief is necessary to afford the adequate protection of constitutional rights [*Dombrowski* v. *Pfister, supra*]. Appellants failed completely to meet the burden of this requirement.

The core of the appellants' grievance is that the preceding arrests were performed in the absence of an adversary hearing on the issue of obscenity. Conducted without this safeguard, appellants claimed, the arrests prompted newsdealers, fearing additional arrests, to refuse any

further subscriptions of tabloids. Consequently, the circulation of the weeklies in New York County allegedly diminished to the point where New York Feed and Milky Way faced economic extinction. Against this background, however, as the lower court found, appellants "acquiesced in the postponement of the pending state criminal proceedings" and deliberately "neglected to press for their right to speedy state adjudications or even to raise in the state courts the issues of constitutional law they want this court to decide" (Appendix of New York Feed, p. 29). Indeed, the record establishes that a period of four months elapsed during which the appellants never sought to utilize the various procedural devices available in the state forum to vindicate their constitutional claims; the first arrests were made on May 20, 1969, while the initial complaint was filed in the District Court on August 18. Instead they chose "simply to bypass that avenue of relief in favor of seeking federal intervention. If such delay and disregard of state processes pending the arrival of self-inflicted 'emergencies' could meet the test for a federal injunction, the abrasive device would promptly lose its 'exceptional' character and would become a commonplace irritant" (*id.* at 30). Inaction by the appellants and their complete disregard for the state judicial processes surely refute any claim of irreparable injury, and the absence of such injury rendered the aid of a federal court unnecessary.

Beyond this consideration, appellants have failed to demonstrate that the arrests or prosecution were or will be undertaken in bad faith, an element which, under the *Dombrowski* case, must be sufficiently alleged before a federal court will decide to intervene. See also *Cameron* v. *Johnson,* 390 U.S. 611 (1968). Thus, even assuming the financial

plight of appellants (an assumption impeached by the widespread distribution and sale of their tabloids) the injury complained of is the normal injury incident to properly initiated prosecution. Intervention is required only in order to prevent that form of injury, resulting from extraordinary abuses in prosecution, which prevents a criminal defendant from asserting his constitutional defenses in the state forum. Thus, in *Dombrowski, supra,* there were specifically detailed allegations that, following an order granting a motion to suppress evidence illegally seized in a raid wherein plaintiffs were arrested and their offices ransacked, the plaintiffs were threatened with renewed prosecution, undertaken without any hope of success, under statutes plainly void under the First Amendment, for the sole purpose of inflicting harassment and intimidation upon the plaintiffs, suppressing their political views, and deterring them from exercising their civil rights. This Court held that by the very nature of these particularized allegations, the court in which the prosecutions were pending at the time of the appeal would not assure adequate vindication of constitutional rights. One of the two necessary ingredients, necessitating the aid of a federal court, was the allegation wherein:

> "* * * appellants have attacked the good faith of the appellees in enforcing the statutes, claiming that they have invoked, and threaten to continue to invoke, criminal process without any hope of ultimate success, but only to discourage appellants' civil rights activities * * *" [*Dombrowski* v. *Pfister, supra* at 490].

In the present case, the passing and conclusory charge of bad faith is linked solely to appellants' legal contention that an arrest for obscenity must be preceded by an adversary hearing. But the alleged infirmity of a rule of criminal

procedure is by no means synonymous with bad faith. Indeed, the good faith of the appellees is demonstrated by the scrupulous withholding of prosecution in each instance pending a determination by a neutral and detached judge of the Criminal Court. And the appellees had a sound basis for believing that the criminal charges would be sustained, because a positive judicial finding of obscenity was made on five different occasions before an arrest warrant was issued. Further, no seizures were made, and the parties were free to continue distribution. Hence, the lower court found:

> "In any event, the requisite bad faith has not been shown. In fact, beginning with the prosecutions of the 'Screw' people in May, the papers and oral submissions give a convincing picture of careful, discriminating prosecutions in *good faith*" (Appendix of New York Feed, pp. 30-1).

Further, it can scarcely be maintained that *Dombrowski* permits a federal court to review on a piecemeal basis an arresting procedure that is supported by appellate court decisions [*cf. Stanford* v. *Texas,* 379 U.S. 476 (1964); *People* v. *Rothenberg;* 20 N.Y.2d 35 (1967)]. Otherwise, for example, a motion to suppress evidence, on whatever ground, might just as well be brought in a federal forum, thereby disrupting the orderly flow and process of litigation in the state courts. Since this Court has rejected this approach, judicial responsibility for handling such problems lies within the exclusive province of the state tribunals. Finally, the mere possibility of error during a criminal trial has never warranted the intrusion of a federal court, even under *Dombrowski*:

> "* * * It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court and that the mere possibil-

ity of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings" [*Dombrowski* v. *Pfister, supra* at 484].

Additionally, the considerations above dictate clearly that appellants' request for a declatory judgment that the state obscenity laws are unconstitutional also should have been denied without a review on the merits. Admittedly, the denial of an injunction does not foreclose the issuance of declaratory relief under appropriate circumstances [*Zwickler* v. *Koota*, 389 U.S. 241 (1968); *Douglas* v. *City of Jeannette, supra*]. But there was absolutely no demonstration of a compelling need for the lower court to become involved in a dispute already four months old. Quite the contrary, it has always been a long standing rule that, in the exercise of sound judicial discretion, declaratory relief should be denied where the identical issue is or may be raised in litigation pending between the same parties, as the present case demonstrates [*Abbott Labs.* v. *Gardner*, 387 U.S. 136, 155 (1967); *Public Affairs Associates, Inc.* v. *Rickover*, 369 U.S. 111, 112 (1962)]. Nor is such extraordinary relief available if the pending litigation between the same parties is a state criminal prosecution [*Henderson* v. *Trailway Bus Co.*, 194 F. Supp. 423 (E.D. W. Va. 1961), *aff'd*, 374 U.S. 488 (1963); *Richardson* v. *Dudley*, 295 F. Supp. 181 (S.D.N.Y. 1969)]. Quite apart from the belated assertion of their constitutional rights in the court below, appellants' prolonged silence vis-a-vis the state courts is sufficient to rebut what they characterize as exigent circumstances requiring the intervention of a federal court.

Too, while a declaratory judgment would have the same disruptive effect on state criminal processes as an injunction, there is no reason to believe that the New York courts will not give the closest scrutiny to the claims presented herein. If appellants' constitutional claims are correct, there is no showing that the state courts will reject them, or will not construe the state statutes to preserve their constitutionality [*People* v. *Rothenberg*, 20 N.Y.2d 35 (1967) (search warrant in obscenity case must particularly describe the items to be seized); *People* v. *Epton*, 19 N.Y.2d 496 (1967), *cert. denied, appeal dismissed*, 390 U.S. 29, *reh. denied*, 390 U.S. 976 (1968) (criminal anarchy statute construed to require proof of specific intent and clear and present danger); *People* v. *Finkelstein*, 9 N.Y.2d 342 (1961) (obscenity statute construed to require proof of the element of scienter)]. Thus, since the drawn-out nature of these proceedings dispels the need for immediate federal action, and since the state courts can adequately dispense relief if it should be forthcoming, the proper course of action for this Court to take is to dismiss the appeals without any consideration of the merits.

Even on the merits, there was no substantial federal question warranting the convening of a three judge court.

New York's statutory definition of obscenity is plainly valid.

As indicated in its opinion, the lower court took the position that the appellants' constitutional attack upon Section 235.00 of the New York Penal Law was of sufficient substance to justify the convening of a three judge court under 28 U.S.C. Section 2281 (Appendix of New York Feed, pp.

36-7). But since the arguments tendered below were plainly frivolous and have been rejected by decisions of this Court, the order convening the three judges should have been dissolved.

For, it is well settled that Section 2281 does not require the convening of a three judge court when the claim that a statute is unconstitutional is patently insubstantial [*Swift & Co.* v. *Wickham*, 382 U. S. 111 (1965); *Bailey* v. *Patterson*, 369 U. S. 31 (1962)]; the federal question raised must be substantial [*Flast* v. *Cohen*, 392 U. S. 83, 91 (1968); *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U. S. 713 (1962); *Ex parte Poresky*, 290 U. S. 30 (1933)]. The convening of a three judge court is not an automatic ritual to be performed by the district judge in every instance where a litigant seeks to challenge the constitutionality of a state statute [*Boone* v. *Wyman*, 295 F. Supp. 1143, 1148 (S.D.N.Y. 1969)].

The New York obscenity statute contains the proper ascertainable standards of guilt, mandated by the decisions of this Court. Section 235.05 of the New York Penal Law states that:

> "A person is guilty of obscenity when, knowing its contents and character, he:
>
> 1. Promotes, or possesses with intent to promote any obscene material; * * *"

The term "obscene" is defined in §235.00 (1) as follows:

> "* * * Any material or performance is 'obscene' if (a) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, ex-

> cretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters, and (c) it is utterly without redeeming social value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience."

These statutory provisions reflect precisely the standards contained in Supreme Court decisions governing obscenity prosecutions. These decisions define obscenity as follows:

> "Whether to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest" [*Roth* v. *United States*, 354 U. S. 476, 489 (1957)].

Under this definition three elements must be proven. The prosecution must establish that (a) the dominant theme of the material taken as a whole appeals to prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value [*Redrup* v. *New York*, 386 U. S. 767 (1967); *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966); *Jacobellis* v. *Ohio*, 378 U. S. 184 (1964); *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478 (1962)]. As indicated by the drafters of the Penal Law, the definition of "obscenity" contained in Section 235.00(1) incorporates fully and is identical with the federal standards enunciated in *Roth, Jacobellis, Redrup* and *Manual Enterprises, supra*. "Obscenity," then, embraces merely that form of expression which is beyond the purview of

the First Amendment.[2] It is difficult to perceive how the statute could possibly be repugnant to the Constitution. Indeed, this Court heretofore upheld the former New York obscenity statute whose standards were less particularized than the current provisions [*Mishkin* v. *New York*, 383 U. S. 502 (1966)].

However, appellants' attack upon Section 235.00, while novel, was completely without merit. Citing the *per curiam* decision in *Redrup* v. *New York*, 386 U. S. 767 (1967), appellants contend that a publication that is neither pandered, sold to a minor nor foisted upon an unwilling public, is entitled to protection under the First Amendment, regardless of its contents and distribution. They further assert that the absence of these three requirements in Section 235.00 renders it facially unconstitutional. Appellants misconstrue completely the holding in *Redrup*. There, this Court reversed a number of obscenity convictions, which, in the Court's judgment, could not be sustained under the standards now incorporated in the New York statute. While none of the convictions involved pandering, or the sale of material to an unwilling public or a minor, the absence of these facts was not considered critical to the reversals and did not serve as the basis of the Court's decision. Indeed, these hypothetical facts were explored by the Court only because the convictions were constitutionally defective under the traditional substantive

2. Section 235.15 of the Penal Law provides:

"In any prosecution for obscenity, it is an affirmative defense that the persons to whom allegedly obscene material was disseminated, or the audience to an allegedly obscene performance, consisted of persons or institutions having scientific, educational, or governmental or other similar justification for possessing or viewing the same."

tests of obscenity contained in decisions beginning with *Roth* v. *United States*, 354 U. S. 476 (1957). The Court merely suggested that on a different set of facts the failure to meet those settled tests would not be fatal, if the prosecution was brought on a different theory.

Though agreeing with appellees' analysis herein, the lower court found appellants' claim substantial enough to be heard by three judges, for the reason that appellants' erroneous interpretation had won approval by a number of other federal district courts [see *United States* v. *4,400 Copies of Magazines, Etc.*, 276 F. Supp. 902 (D. Md. 1967); *Poulos* v. *Rucker*, 288 F. Supp. 305, 307 (M.D. Ala. 1968); *United States* v. *127,295 Copies of Magazines*, 295 F. Supp. 1186, 1188-9 (D. Md. 1968)]. These lower court decisions notwithstanding, they did not authorize the convening of a three judge court, in the face of clear pronouncements by this Court. For, "[t]he lack of substantiality on a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject" [*California Water Service Co.* v. *City of Redding*, 304 U. S. 252, 255 (1938)]. And clear pronouncements by this Court have rejected the notion that the three additional tests, posited by appellants on the basis of their reading of *Redrup*, are necessary elements in order for the prosecution to obtain an obscenity conviction.

Thus, in *Ginzburg* v. *United States*, 383 U. S. 463, 470-73 (1966), this Court ruled that evidence of pandering, for example, is relevant to a determination of the question of obscenity in a close case, but there was no suggestion that

pandering must be proved in addition to the other elements set forth in *Memoirs* and *Roth, supra* [see also *Memoirs* v. *Massachusetts*, 383 U. S. 413, 420 (Brennan, J. concurring); *Jacobellis* v. *Ohio*, 378 U. S. 184, 201 (Warren, C.J., concurring)].

The three-fold test of *Memoirs, Jacobellis* and *Roth* was recently reaffirmed by this Court in *Stanley* v. *Georgia*, 394 U. S. 557 (1969) where prosecution of obscene material was sanctioned regardless of the particular manner of distribution and the age of the buyer. There, this Court, in striking down a statute making the mere possession of obscene material a crime, unmistakably announced that the standards contained in *Roth* and its progeny continue to be perfectly viable:

> "Roth and the cases following that decision are not impaired by today's hearing. As we have said, the States retain broad power to regulate obscenity * * *" [*Stanley* v. *Georgia, supra* at 568].

This pronouncement emphatically refutes appellants' strained interpretation of *Redrup*.

Nonetheless, it is argued that the right to privately possess obscene material, upheld in *Stanley*, would be meaningless without the corresponding right to sell it, "absent, of course, a sale to a minor; pandering of the merchandise; or foisting it upon an unwilling public" (Jurisdictional Statement of New York Feed, p. 19). Thus, contends New York Feed, the holding in *Stanley* limits state regulation of obscenity to instances where materials are pandered, foisted upon an unwilling public or sold to a minor. But as *Stanley* itself indicates, this argument completely overlooks

an important distinction made in *Griswold* v. *Connecticut*, 381 U. S. 479, 485 (1965). There, this Court held that use of contraceptives by married people was a fundamental constitutional right that could not be abridged by statute. But the Court recognized that while this right is absolute, different constitutional considerations apply to a statute forbidding manufacture of these devices. By the same token, in the present case, New York's power to regulate the sale of obscene material is not foreclosed by anything that was said in *Stanley*, as the reasoning in *Griswold* makes perfectly clear.

The constitutionality of the statutory presumption of knowledge does not raise a justiciable issue on the record before this Court.

Under Section 235.05 of the New York Penal Law, knowledge of the character or contents of a publication is a necessary element of the crime of obscenity to be proved by the prosecution. New York Feed attacks the constitutionality of Section 235.10 of the Penal Law, arguing that the statute contains a presumption of knowledge, applicable to persons selling obscene materials in the course of their business, that is allegedly irrational. But at this juncture of the proceedings, appellant lacks standing to attack the presumption on this ground. For, even assuming that such a challenge were successful, it would in no sense terminate the prosecution against appellants now pending in the New York City Criminal Court, which, of course, is the sole aim of this lawsuit. The District Attorney would still be entitled to continue prosecution on the obscenity charges and rely upon other evidence of guilt, apart from the presump-

tion, to establish the requirement of scienter. Thus, by deciding the constitutional question before it, this Court could do no more than render an advisory opinion, which would leave unchanged appellants' status in the New York courts.

Indeed, the pleadings filed in this case suggest the strong likelihood that the prosecution may find it unnecessary to invoke the procedural benefits of the presumption as part of its proof at trial. The complaints herein allege that the appellants are the editors and publishers of the tabloids in question; therefore, it is more than safe to assume that the appellants are intimately acquainted with both the character and contents of the newspapers, edited and published on a weekly basis. If this sort of evidence is developed at trial, the presumption now under attack may be totally irrelevant to the disposition of the criminal cases, and no real questions as to scienter will be presented [*cf. Mishkin* v. *New York*, 383 U. S. 502, 511 (1966)]. Beyond this, appellants have made absolutely no showing that they are even remotely affected by the statute they seek to challenge. In short, this is neither the proper time nor the proper case to consider the question presented.

In any event, the lower court wisely declined to consider the merits of New York Feed's argument, correctly reasoning, under this Court's decision in *Leary* v. *United States*, 395 U. S. 6 (1969), that the rationality of the presumption could not be determined in the absence of a full "empirical" inquiry on that question [*United States* v. *Gainey*, 380 U. S. 63, 67 (1965); *cf. United States* v. *Romano*, 382 U. S. 136 (1965); *see Turner* v. *United States*, —— U. S. ——, 6 Cr.

L. 3040 (1970)]. As the lower court explained, the resolution of this question "entails the exploration of facts which a legislature has either investigated or otherwise learned about, * * * and which judges cannot notice or pretend to know better merely because of their isolated offices. So, for example, in *Leary*, upon which [appellants] pitch this contention, the Court explored reams of factual material * * *, and relied upon a district court *record* made before a judge concerned with the same problem" (Appendix of New York Feed). Factual allegations, in sufficient detail, and investigation, must precede judicial solutions in this type of case, for the rationality of a statutory presumption does not present what can be described as a pure question of law. Appellants offer no allegations, request no hearing, but merely claim that the statute is unreasonable on its face. Thus, in view of the total inadequacy of the record before it, the lower court cannot be faulted for refusing to resolve this question.

Unsatisfied with this disposition, New York Feed argues, relying upon *Smith* v. *California*, 361 U. S. 147 (1961), that the presumption of knowledge contained in Section 235.10 is inherently irrational. But *Smith* never reached such a determination and held merely that the Constitution prohibits a state from imposing criminal liability for the sale of obscene material without proof of the mental element of scienter. Section 235.05 of the Penal Law, as the practice commentary by the drafters indicates, comports fully with this ruling. That section requires the prosecution to prove beyond a reasonable doubt that a person who sells or promotes an obscene publication knows its contents and character; the rebuttable presumption of knowledge, of course, is an aid that the prosecution may avail itself of in a par-

ticular case. Whether the presumption is rational has never been decided by this Court, appellants' argument to the contrary.

The constitutionality of the State arrest warrant statutes is not properly challenged.

Appellant Milky Way contends that its attack upon the constitutionality of the arrests in the present case is also an attack upon the constitutionality of Section 148, 149, 150 of the New York Code of Criminal Procedure, which thereby required the convening of a three judge court under 28 U.S.C. Section 2281. As found by the lower court, this contention is incorrect (Appendix of New York Feed, p. 36). For the issue whether there is a right to an adversary hearing prior to an arrest in an obscenity case is in no way posed by these statutory provisions. These provisions merely authorize the issuance of an arrest warrant by a court upon a showing of sufficient proof. But the statutes are not addressed to the constitutional issues sought to be raised herein and neither require nor preclude the unique procedure demanded by Milky Way. Additionally, it cannot be successfully argued that the constitutionality of the statutes is brought into controversy simply because they bestow the authority upon the appellees to procure an arrest warrant. This was recognized in *Phillips* v. *United States*, 312 U. S. 246, 252 (1940), where this Court stated:

> "Some constitutional or statutory provision is the ultimate source of all actions by state officials. But an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority even though a misreading of the statute is invoked as justification."

Thus, in the present case, we are not at all concerned whether the provisions of the Code of Criminal Procedure authorize or fail to authorize an adversary hearing prior to an arrest in an obscenity case. What is complained of here is the validity of an arrest in a specific instance. The resolution of this dispute will be governed solely by considerations under the First and Fourth Amendments [*Cooper* v. *California*, 386 U. S. 58, 61 (1967); *Tyrone* v. *Wilkinson*, 410 F.2d 639, 643 (4th Cir. 1969); *cf. Ex parte Bransford*, 310 U. S. 354, 361 (1940)]. Otherwise, for example, every motion to suppress evidence procured by an unlawful search and seizure would always require a holding that the particular statute authorizing the search is unconstitutional. But this Court has consistently rejected this approach in the course of its review of search and seizure cases [*Sibron* v. *New York*, 392 U. S. 40 (1967); *Cooper* v. *California*, *supra*; *Preston* v. *United States*, 376 U. S. 364 (1964); see also *Garrity* v. *New Jersey*, 385 U. S. 493 (1967) (compelled confession)]. Apart from the statutory authority to conduct a search, review is limited to a determination whether, on the facts and circumstances of a particular case, a search is reasonable under the Fourth or, in some cases, the First Amendment [*Stanford* v. *Texas*, 379 U. S. 476 (1964); *Quantity of Books* v. *Kansas*, 378 U. S. 205 (1964); *Marcus* v. *Search Warrants*, 367 U. S. 717 (1961)]. This was explained in greater detail in the *Sibron* case, where the constitutionality of the New York "stop and frisk" law was attacked "on its face." In delineating the proper scope of review, this Court, however, declined

> "to be drawn into what we view as the abstract and unproductive exercise of laying the extraordinarily elastic categories of §180-a next to the categories of the

Fourth Amendment in an effort to determine whether the two are in some sense compatible * * *

"Section 180-a * * * deals with the substantive validity of certain types of seizures and searches without warrants. It purports to authorize police officers to 'stop,' people, 'demand' explanations of them and 'search [them] for dangerous weapon[s],' in certain circumstances upon 'reasonable suspicion' that they are engaged in criminal activity and that they represent a danger to the policeman. The operative categories of §180-a are not categories of the Fourth Amendment, and they are susceptible of a wide variety of interpretations" [*Sibron* v. *New York*, *supra* at 59-60].

Similarly, in the present case the legislature's sole purpose in the enactment of Section 150 of the Code of Criminal Procedure was to assure that magistrates do not issue arrest warrants unless they are satisfied that a crime has been committed. As in *Sibron*, the "category" upon which the statute focuses cannot be compared with the requirements of the First Amendment. Consequently, the constitutionality of the statute is not presented by Milky Way's attack upon the legality of particular arrests.

The arrests of appellants' customers pursuant to warrants raise no question under the First Amendment, and appellants lack standing to challenge them.

Although each arrest occurred pursuant to a warrant based upon judicial review of the subject publication which resulted in a finding of probable cause to believe that a crime had been committed, appellants argue that the arrests were defective, since they were not preceded by an adversary hearing on the issue of obscenity. This argu-

ment is wholly without legal support, and raises no substantial federal question. [*Rage Books, Inc.* v. *Leary*, 301 F. Supp. 546 (S.D.N.Y. 1969)].

At the outset, it should be observed that appellants lack the requisite standing to raise this question. The essence of the appellants' argument is that the arrest of a newsdealer for selling a particular publication purchased by him from appellants inhibited the newsdealer from purchasing subsequent issues of the same tabloid. This inhibition, it was claimed, resulted in a prior restraint upon the publication in question, which thereby reduced the overall circulation of the tabloids. It is against this background that appellants predicate their right to an adversary proceeding before they can be arrested. It is not claimed, however, that the appellants, when arrested, were inhibited from disseminating further issues of either *Screw* or *The Review of Sex*. Appellants have always been eager and ready to market and distribute their product. Instead, the First Amendment claim asserted herein is derived solely from the contention that the inhibitory effect of an arrest upon a newsdealer, reducing the circulation of the tabloids, requires that appellants be given a preliminary adversary proceeding. In effect, then, appellants are seeking to attack the arrests of the newsdealers, not their own. But if the newsdealers' arrests were performed in violation of the First Amendment, the right to advance this argument belongs to the newsdealers and not the appellants. Thus, the question before this Court can only be decided in a proceeding where the newsdealers, themselves, collectively seek to raise it.

Indeed, this Court has repeatedly held that constitutional rights are personal rights and cannot be "vicariously asserted" [*Alderman* v. *United States*, 394 U.S. 165, 174 (1969); see *Tileston* v. *Ullman*, 318 U.S. 44 (1943); *Jones* v. *United States*, 362 U.S. 257 (1960); *cf. Pierce* v. *Society of Sisters*, 268 U.S. 510 (1924); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923)]. In the *Alderman* case, it was decided that a criminal defendant cannot object to the introduction of evidence seized in violation of the Fourth Amendment rights of another person. Analogously, the appellants should not be permitted to interrupt the prosecution pending against them in the state courts simply because an arrest of a third party may be defective. In *Tileston*, the Court held that a physician would not be permitted to challenge the constitutionality of a state statute proscribing the use of contraceptive devices by married people, which allegedly prevented him from giving medical advice to his patients. Interestingly, this result was reached despite the fact that the statute under attack had an allegedly inhibitory effect upon the practice of medicine. Of course, appellants in the present case are not so similarly inhibited by the arresting procedures employed by the appellees. Moreover, appellants' relationship with the newsdealers is contractual and not representative, as was the situation in *NAACP* v. *Alabama ex rel Patterson*, 357 U.S. 449 (1958). And we need not be concerned in this case with sanctioning a judicial policy that encourages racial discrimination [*cf. Barrows* v. *Jackson*, 346 U.S. 249 (1953)]. Clearly, then, the question sought to be raised before this Court should not be decided in this proceeding.

In any event, appellants' argument is totally lacking in substance. For, a simple arrest is in no way determinative

of the ultimate issue of guilt or innocence. Nor were the instant arrests utilized to remove from circulation, by way of incidental seizure, mass quantities of literary materials. Rather they fulfilled the limited purpose of bringing before the court for formal charges and arraignment persons accused of a crime. Every individual so charged is adequately protected by the procedural safeguards of the Criminal Court and the important assurance that he will receive a prompt trial and appeal. No more can reasonably be expected, for, if a prospective criminal defendant is given the right to litigate whether, in the first instance, he can be properly charged with a crime, the District Attorney's or the grand jury's right to initiate prosecution no longer exists.

Moreover, the decisions cited by the plaintiffs as controlling have no relevance to the issue at bar. For example, in *Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964), a civil procedure for the issuance of a search warrant had been used to impound 1715 books without more than the magistrate's cursory perusal of 7 titles, which in the words of the Supreme Court was "more repressive than an injunction preventing further sale of the books" [*Quantity of Books, supra* at 210]. Accordingly, confiscatory seizure of this type in the absence of an adversary judicial determination was held to be improper. In *Bee See Books* v. *Leary*, 291 F. Supp. 622 (S.D.N.Y. 1968), a prior restraint upon the sale of books was imposed by the deployment of uniformed police officers in retail outlets to uncover pornography. This practice, by discouraging prospective purchasers from entering the store, deprived the bookseller of his right to distribute material not previously the subject

of a judicial ruling on the issue of obscenity. As is clearly evident, these and other decisions cited by the plaintiffs are of little aid in appraising the constitutionality of the procedure employed in the conduct of an arrest. Each of these cases involved an auxiliary means of suppressing publications which was found to be imperfect. At issue were procedures designed to enjoin from distribution without proper safeguards materials arguably protected under stringent standards of the First Amendment. An arrest, on the other hand, merely initiates criminal charges and brings a criminal defendant to trial. No issue of a prior restraint against a publication is presented, for the publisher's right to sell and society's right to receive the material is not impaired by the simple temporary detention of the accused. Clearly, an arrest is but merely one part of the penal process which, after the event in question takes place, reviews conduct that the state has reason to believe was prohibited.

This was the precise conclusion reached in *United States* v. *Wild*, —— F:2d —— (2d Cir. 1969) (N.Y.L.Jour. December 1, 1969 p. 1, Column 7). There, the defendants were lawfully arrested in their apartment pursuant to a bench warrant issued after the return of an indictment, charging violations of the federal obscenity law. A search of the premises was then conducted incident to the arrest, and a number of items were seized, including photographs and film, allegedly obscene. The Court of Appeals rejected the argument that the absence of an adversary proceeding invalidated the seizures, holding that both *Quantity of Books* and *Marcus* v. *Search Warrants*, 367 U.S. 717 (1961) were "inapposite," since they were concerned merely with

"massive seizures of books under state statutes which authorized warrants for the seizure of obscene materials as a first step in civil proceedings authorizing their destruction." These decisions, the court went on, cannot "be read to proscribe the application of the ordinary methods of initiating criminal prosecution to obscenity cases" [*United States* v. *Wild, supra*]. The legality of the arrests in the present case also finds support in *Mishkin* v. *New York*, 383 U.S. 502, 513 (1966). In *Mishkin*, this Court refused to pass on the identical contention raised in *Wild*, since the appellate record did not satisfactorily indicate whether the seizures complained of were "of a massive quality." By abstaining from review, the Court implicitly acknowledged that an adversary proceeding is not necessary to sustain the legality of every search or arrest. Otherwise, the Court would have decided the question before it irrespective of the inadequacy of the record concerning the actual number of items seized.

In a curious argument, however, appellants contend that the arrest, like an injunction, prevented the dissemination of subsequent issues of their newspapers. Thus, for example, Milky Way asserts that certain newsdealers, arrested for selling issue 17 of *Screw*, refused to subscribe to the two following issues, 18 and 19, neither of which was ever the subject of judicial review. Consequently, the sales of these two editions of the paper allegedly decreased. New York Feed also points out that after newsdealers were arrested for selling issues 9 and 12 of *The Review of Sex* the circulation of this tabloid diminished. Their contention, then, is that the arrests operated as a prior restraint upon the distribution and sale of subsequent issues of the two

tabloids. This argument is totally without merit and represents no more than an improper characterization of the effect of the arrests upon the resultant conduct of newsdealers.

Quite clearly, even under the facts alleged, the arrests merely inhibited some newsdealers from purchasing materials similar to those which were presently the subject of a pending prosecution. This alleged inhibitory effect, followed by the ensuing reduction in the circulation of the newspapers, is not attributable to the State, but, instead, is a normal consequence of the newsdealers' decision to perform those voluntary steps which they deem necessary to comply with the law. As this Court is well aware, newsdealers in the present case are confronted with the difficulties in the application of the law to a publication offered to them for sale, which is simply an inherent problem attendant in the dissemination of any publication bordering on obscenity. A determination that a particular work is obscene depends upon the facts and circumstances of each case. Often it cannot be predicted with certainty whether a given form of expression lies within the protected area of the First Amendment. Conscious of this unfortunate predicament, the Supreme Court has nonetheless held that the *in terrorem* effect of an arrest similar to those herein is unavoidable and of no constitutional significance. In *Smith* v. *California,* 361 U.S. 147, 154 (1959), the Court observed that:

> "Doubtless any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect upon the dissemination of material not obscene."

In short, the jeopardy faced by the arrests is no more than the restraint of the obscenity law itself, which thereby leads to self-censorship, at the option of the newsdealers, in respect to future editions of the appellants' newspapers. Contrary to their arguments, this phenomenon does not raise any question concerning a prior restraint.

Moreover, appellants' contentions, if accepted, would lead to absurd consequences. For example, for reasons which are quite obvious, federal and state grand juries would no longer be able to return indictments against individuals for using the mail to transport obscene material. Further, the trial of a bookseller would have to be conducted under conditions of strict secrecy in order to eliminate any possible inhibitions upon his competitors. Indeed, an adversary hearing to determine whether there is probable cause to make an arrest would have the same inhibitory effect as the arrests in the present case allegedly had. Appellants attempt to answer this argument in two ways. New York Feed argues:

> "Only in an adversary form will the investigating magistrate be adequately advised of both the authorities and reasons why the questioned publication is not obscene." [Brief for New York Feed filed in the lower court at p. 11.]

This contention, which is no more than an assertion that the materials currently being prosecuted are not obscene, has no bearing on the question whether the procedures employed in the conduct of the arrests were proper. The issue of the appellants' guilt or innocence should be determined only in a trial in the state courts. This argument, therefore, is without merit. Milky Way takes a differ-

ent approach. It argues that the adversary proceeding would have the sole purpose of framing guidelines for the future conduct of newsdealers. Thus, appellants' position is that a hearing during which a court determines that a publication is probably obscene would nevertheless immunize newsdealers from the penal effects of all sales made prior to the court's ruling. Following the hearing, the newsdealers would have the opportunity to comply with the law by returning the illegal merchandise to the publisher, or, after making additional sales, face prosecution and rely on a defense that the material is not obscene. This contention is absurd. For obviously, to have any significance in the enforcement of the criminal law, the court's finding of probable cause would require the immediate arrest of alleged offenders. Under the scheme envisioned by Milky Way, results of the adversary proceeding would serve as an advisory opinion which, in all reality, would preclude the need forever of the District Attorney to prosecute violators of the obscenity laws. In effect, the essence of appellant's frivolous argument is that he is entitled forever to "one bite out of the apple," each time an apple ripens on the forbidden tree. The First Amendment does not require immunity from prosecution under state and federal obscenity laws. See *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

Finally, Milky Way argues that the arrests of newsdealers were improper since the State has at its disposal other methods of attacking obscene material. This contention requires little refutation. Suffice it to say, regardless of these supposed alternatives, the State has the right to enforce its own laws making it a crime to promote

obscenity. Additionally, the plaintiff argues, citing *Bantam Books* v. *Sullivan*, 372 U.S. 58, 71 (1963), that private consultation between law enforcement officials and newsdealers is required before the District Attorney can initiate a criminal proceeding. However, the Court's mention of preliminary negotiations was intended as a suggestion only and not a constitutionally required device which must precede prosecution.

Conclusion

The appeal should be dismissed, or in the alternative, the order below should be affirmed.

Respectfully submitted,

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